



OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION

April 29, 2014

VIA EMAIL

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Field Supervisor

Oklahoma Ecological Services Field Office

U.S. Fish and Wildlife Service

9014 E. 21st St.

Tulsa, OK 74129

Re: Notice of Availability: Draft Environmental Assessment and Draft Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma
[FWS-R2-ES-2014-N040; FXES11120200000-145-FF02ENEH00]

The Oklahoma Independent Petroleum Association and its member companies, (collectively "OIPA") submit these comments in response to the above-referenced Notice of Availability ("NOA") regarding the Draft Environmental Assessment ("EA") for the Oil and Gas Industry Conservation Plan ("ICP") for the American burying beetle ("ABB") in Oklahoma. *Notice of Availability and Request for Comments*, 79 Fed. Reg. 21480 (April 16, 2014). We appreciate the opportunity to submit comments on the proposed ICP and look forward to continuing to work with the U.S. Fish and Wildlife Service ("FWS" or "the Service") to develop an effective and responsive plan.

OIPA, founded in 1955, represents approximately 2,750 small to large independent operators that are primarily involved with the exploration, production, processing, transmission and/or distribution of crude oil, natural gas and natural gas liquids in Oklahoma. In addition, we represent a number of companies which provide services supporting exploration and production activities. "Independent" producers are non-integrated companies which receive the majority of their revenues from production at the wellhead. They are exclusively in the exploration and production segment of the industry, with no marketing or refining operations as compared to large, integrated, major oil and gas companies. Independent oil and gas companies range in size from large companies with thousands of employees to hundreds of smaller "mom and pop"-type companies. In Oklahoma, independent producers make up the majority of the energy industry, producing 96% of the state's crude oil and 88% of the state's natural gas.

Our members live and work in the area where they explore, drill, complete, produce, process and distribute these critical resources. We are committed to protecting the state's biological resources, which significantly contribute to our quality of life. For all of these reasons we applaud the Service's proposal to develop a conservation plan to address potential impacts to the ABB, while simultaneously streamlining the Endangered Species Act ("ESA") permitting process for industry. OIPA welcomes the USFWS issuance of an ICP for the ABB in Oklahoma,

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and recognizes the efforts of the USFWS to address the urgent needs of industry to have a mechanism to obtain Section 10 incidental take permits for this species. To that end, we have taken and will continue to take an active role in the development of the ICP.

I. OIPA'S GENERAL COMMENTS CONCERNING THE SPECIES' STATUS

Due to the inherent urgency of the industry to obtain a permit mechanism for the ABB, OIPA accepts that USFWS developed this ICP based on scientific assumptions the industry may have otherwise challenged.

For example, there remains to be a significant variance in the "best available science" and the transparency of information as it relates to this species. OIPA is hopeful that the USFWS will continue to enhance the visibility of these materials and be more transparent in with their use and justification of available science for this species, and how the use of these assimilated data points from the experts translated into biological goals and conservation strategies implemented for this species. A few basic examples of this, from the perspective of industry, have been included below:

A. When the species was originally listed on July 13, 1989, it was only known to be present in two locations: Block Island, Rhode Island, and one population extending into 4 counties in Oklahoma. In Oklahoma there have now been confirmed occurrences in 29 counties, and the ABB is known to occur in 9 states. Almost all of this expanded range has been identified prior to the elimination of historic avoidance practices (bait away and trap and release). The USFWS continues to cite "best available science" to eliminate avoidance practices and to apply increasingly stringent mitigation requirements. These increasingly stringent measures are inconsistent with the most significant piece of best available science: that the ABB occurrence expanded dramatically without the use of the newly proposed mitigation and avoidance measures, and therefore historic avoidance practices were adequate to protect the species.

B. The expanded range and confirmed occurrences of ABB in Oklahoma significantly overlap the areas of extensive oil and gas development during the 25 years since the listing of the ABB, which is a strong indicator that the oil and gas industry is not an appreciable threat to the ABB. However, the ICP presumes that the relatively disperse habitat impacts associated with the oil and gas activity should be a proxy for actual ABB takes; this directly conflicts with the fact that the ABB range is expanding into active areas of oil and gas development and therefore significantly overstates the impacts of the oil and gas industry. Additionally, the ICP presumes that fragmentation of habitat caused by oil and gas activities is a contributing threat to the ABB and therefore penalizes the conversion of forested ABB habitat to herbaceous ABB habitat; this again conflicts with the fact that the ABB range is expanding into active areas of oil

and gas development. Moreover, this presumption misconstrues the ABB's biology because, as FWS recognizes, the species thrives in both habitat types. Given that the ABB has not demonstrated a preference for one habitat over the other (i.e., forested habitat is no more valuable to the species than herbaceous habitat), permittees should not be penalized for so-called "habitat conversion." Such mitigation requirements do not satisfy the Service's obligation to ensure that mitigation is based on a "sound biological rationale" and that it be "commensurate with the impacts" addressed. *See* U.S. FWS & NMFS, Habitat Conservation Planning Handbook at 3-19 (1996).

C. OIPA would also like to take this opportunity to remind the USFWS that it has a statutory obligation to conduct a 5-year review of the ABB pursuant to section 4 of the ESA, 16 U.S.C. § 1533(c)(2). OIPA would boldly like to remind the USFWS that they have missed such statutory deadline for conducting the 5-year review, and OIPA is confident that the growing body of biological data concerning the ABB and its ever-expanding range demonstrate **that the species must be downlisted or delisted entirely!**

II. **OIPA'S SUBSTANTIVE COMMENTS AFFECTING ALL DOCUMENTS**

OIPA requests that the Service revise the ICP, Permit, and supporting documents to address the substantive issues outlined below.

A. **The ICP Should Provide Additional Options for Mitigating Impacts to the ABB**

The ICP's requirement that permittees mitigate all impacts to the ABB in perpetuity, and the few mitigation options that meet this requirement, do not provide permittees with sufficient flexibility to mitigate impacts. As a practical matter, of the three mitigation options identified in the ICP, the acquisition of conservation banking credits generally remains to be the only feasible mitigation option for most oil and gas operators. Indeed, in the ICP, the Service recognizes that third-party mitigation lands "are usually established for a single project rather than multiple projects," such as the multiple oil and gas wells an operator may drill. *See* ICP, pg. 46; ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, pg. 6. Similarly, the transaction costs of permittee-established mitigation likely will prevent permittees from acquiring and managing their own mitigation lands. The Service should identify additional mitigation options to ensure adequate mitigation and allow operators greater flexibility to mitigate impacts. For example, operators should be able to mitigate impacts by remediating and/or restoring existing roads and well pads that are no longer in operation. In addition, permittees should receive mitigation credit for reclaiming historically disturbed sites (e.g., agriculture fields) to convert unsuitable habitat into suitable habitat.

B. Industry's Development Activities Should Not Require Permanent Mitigation

The fact that "temporary impacts" may affect the ABB for a period longer than five years does not necessarily mean that impacts to the ABB are permanent. The FWS should authorize mitigation in place for a term longer than five years (but not permanent) to offset temporary impacts. Moreover, a possibility exists that there will not be enough permanent mitigation available to offset impacts. Allowing permittees to establish mitigation that lasts for a term but is not permanent may provide permittees with additional mitigation options other than those identified in the ICP.

C. Expansion of the Definition of "Take" Within the ICP

USFWS has previously been careful to make it clear that the use of acres of disturbance is only a proxy or surrogate to estimate the amount of take of ABB, which makes it clear they are not re-defining take. But the ICP contains two significant discussions which are inconsistent with the fact that the USFWS does not have the authority to expand the definition of take to include impacts to habitat that have not been designated as critical habitat. Since no critical habitat has been identified for the ABB, any language implying that the agency is revising the definition of take, even if just for the purposes of the ICP, is careless and incorrect.

1. Section 3.1.1 "Use of Impacts to Habitat as a Proxy for Take" states, "For the purposes of this ICP, the Service defines incidental take in terms of the number of occupied acres disturbed. The Service considers using acres of habitat disturbed as an appropriate surrogate, because habitat disturbance is expected to be the primary cause of take resulting from the Covered Activities." This language expands the definition of take beyond what is allowed in the regulations. A more correct statement is that which the USFWS has previously used: "Because quantification of ABB individuals impacted incidental to Covered Activities is not possible given available data, the Service believes that relying on impacts to ABB habitat is a suitable surrogate to estimate the amount of take that is likely to occur."

2. On the Cover Sheet, the most recent revision reads, "For the purposes of this ICP, the Services defines incidental take in terms of the number of acres of occupied ABB habitat disturbed (Section 3.3.1)." As discussed above, this language is incorrect and should be revised to eliminate the impression that the USFWS has the authority to expand the definition of take, even if it is just "for the purposes of this ICP."

OIPA requests that the USFWS clarify in the ICP that the choice to participate in the ICP through the permit process does not assert that individual projects performed by the applicant

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must be covered under the ICP because, under Section 10, applicants retain the rights to determine that a particular project will not result in take and to seek alternate compliance mechanisms for projects that they determine may result in a take. We further ask FWS to clarify that a project proponent's choice not to participate in the ICP for any given project located in occupied ABB habitat does not necessarily mean, as a matter of law, that the project will cause incidental take of the ABB

D. The Service Should Consider Permitting Activities that are Partly Contained within the ICP Planning Area

The ICP and its supporting documents make clear that only activities that are fully contained within ICP Planning Area may be covered by the Permit. ICP, pg. 10; Eligibility Determination for the ABB ICP, pg. 2. The FWS should provide its rationale for this position, which is unclear and must be explained. If the FWS is attempting to narrow the scope of the impacts analyzed in the EA or its Section 7 consultation, limiting the authorization is not the way to do so. The FWS should explain that projects with termini outside of the Planning Area require case-by-case review by the FWS to determine whether the EA and Section 7 consultation associated with the ICP adequately analyzed the project's impacts; if the EA and Section 7 consultation did not consider impacts of specific projects with termini outside of the project area, additional National Environmental Policy Act ("NEPA") analysis and/or Section 7 consultation may be necessary. This approach provides FWS with the flexibility to consider projects with termini outside of the Planning Area while still limiting the scope of the EA and Section 7 consultation to a manageable amount.

E. The Permit May Not Regulate Activities Occurring Entirely Outside of ABB Habitat

Using ABB habitat as a proxy for measuring incidental take, the draft Permit states that impacts to and loss of ABB habitat may not exceed a cumulative total of 32,234 acres from all permits issued under the ICP. Permit, pg. 2. In addition to this limitation on impacts to ABB habitat, however, Section I, Covered Area (Plan Area), of the Permit also constrains the amount of development that may occur in the 35,000-square mile planning area ("Planning Area") for the ICP:

No more than 37,569 acres (15,204 hectares) of the Planning Area will be directly impacted by covered activities: including up to 2,030 miles (3,267 kilometers) of pipeline, 193 miles (311 kilometers) of roads (158 miles (254 kilometers) of permanent roads associated with wells, 30 miles (48 kilometers) of temporary roads associated with wells, and 5 miles (8 kilometers) associated with pipelines) and 3,319 well pads (approximately 4 acres (1.6 hectares) each), and 230 miles (370 kilometers) of electric distribution lines.

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Permit, pg. 3. The EA contains similar statements. *See* EA, pgs. 4-1, 4-4, 4-12, 4-20, 4-31, 5-6. Although the ICP anticipates that 37,579 acres will be impacted by oil and gas activities in the Planning Area, the ICP does not limit impacts to this amount. *See* ICP, pg. 38.

The Service may not limit oil and gas activities occurring in the Planning Area but entirely outside of occupied ABB habitat. The ICP assumes that only 85.8 percent of the Planning Area may be habitat for the ABB. ICP pg. 34. The Service has recognized that activities in areas that are not favorable for use by ABB do not result in take of the ABB. Activities may proceed within the Planning Area in areas that are not favorable for use by ABB (as well as in unoccupied ABB habitat) without need for incidental take coverage. *See* ABB Impact Assessment for Project Review, pg. 10. Accordingly, the Service has no jurisdiction to restrict activities occurring entirely outside of occupied ABB habitat. OIPA requests that the Service revise the Permit to remove the limitation on impacts in the Planning Area set forth in Section I, Covered Area (Plan Area), of the Permit and remove similar references from the EA.

F. The Service Must Resolve Inconsistencies between the ICP, EA, and Supporting Documents

The ICP, EA, and supporting documents contain inconsistencies with respect to minimization and mitigation measures, reporting requirements, the activities covered by the Permit, and changed circumstances. These inconsistencies must be resolved.

1. The ICP and Permit Must Consistently Describe Minimization and Mitigation Measures

Several inconsistencies exist between the minimization and mitigation measures identified in the ICP and Permit. First, with respect to minimization measure No. 6 (Use of Artificial Lighting), the ICP states that “activities occurring during the ABB active season within occupied ABB habitat will be limited to daylight hours.” ICP, pg. 42. The Permit, however, states that “construction activities” are subject to this limitation. Permit, pg. 5. The ICP and Permit must consistently identify which activities are restricted to daylight hours.

Second, with respect to mitigation measure No. 3 for post-construction restoration for temporary and permanent cover change impacts (Re-establishment of Vegetation), the ICP contains the following statement: “Preference should be given to the establishment of native vegetation if the landowner does not have specific requests and restoration of native vegetation is feasible.” ICP, pg. 45. The Permit lacks this statement. *See* Permit, pg. 7. This statement should be added to the Permit.

Third, with respect to the offsite habitat mitigation options described in section 4.2.2.2 of the ICP, this discussion includes much more detail than the corresponding discussion in the Permit. *Compare* ICP, pgs. 45–47 *with* Permit, pg. 8. Conceivably, a permittee may look to the

language of the Permit without realizing that additional requirements are contained in the ICP. Therefore, OIPA requests that the Permit language mirror the ICP language, or simply incorporate the ICP language by reference, to avoid confusion or misunderstanding.

2. The ICP and Permit Must Consistently Describe Reporting Obligations

The Service must review and revise the annual reporting requirements in the ICP and Permit to ensure consistency between the two documents. The ICP and Permit currently set forth different annual reporting requirements. *Compare* ICP, pg. 72 *with* Permit, pg. 10. For example, the ICP requires a map identifying the location of impacts but the Permit does not. *Id.* Similarly, the ICP requires “Permit number and IPP numbers” but the Permit does not. *Id.* Other inconsistencies exist as well. The Service must revise the reporting requirements in the ICP and Permit to ensure they are consistent.

3. Covered Upstream Activities Must be Consistently Described

The Permit lists the construction of pipelines within a well pad area as an upstream activity covered by the Permits. *See* Permit, pg. 3. The ICP and EA, however, do not list the construction of pipelines within the well pad area as a covered upstream activity, *see* ICP, pg. 10; EA, pg. 2-2, although elsewhere these documents generally describe this activity as an upstream production activity. ICP, pg. 15; EA, pg. 2-2. The Service must revise the ICP, EA, and Permit to clearly identify whether the construction of pipelines within a well pad area is a covered upstream activity.

Additionally, the ICP identifies “drilling and production” activities as activities covered by the Permits (“Covered Activities”). *See* ICP, pg. 13. Elsewhere, however, the ICP only identifies “drilling and hydraulic fracturing” among the Covered Activities. *See* ICP, pg. 10. Similarly, the EA and Permit only identify drilling and hydraulic fracturing as Covered Activities. *See* EA, pg. 2-2; Permit, pg. 3. The Service must consistently describe production activities as those activities that are covered by the Permits.

4. Operation and Maintenance Activities Must be Consistently Described

The ICP explains that operation and maintenance activities associated with midstream development include emergency (unplanned) repairs. *See* ICP, pg. 19. The EA, however, omits emergency or unplanned repairs from the list of activities associated with the operation and maintenance of midstream pipelines. *See* EA, pg. 2-7. The Service should revise the list of operation and maintenance activities associated with midstream pipelines in the EA to include emergency repairs and ensure that any reasonably foreseeable effects to the human environment from those activities have been considered in the NEPA document.

5. Changed Circumstances Must be Consistently Described

One assumption outlined in the changed circumstances discussion in the ICP differs from the assumption stated in the Permit. The ICP assumes that “[a]reas with ‘temporary impacts’ or ‘permanent cover change impacts’ become suitable for ABB use within 5 years of disturbance.” ICP, pg. 53 (Assumption No. 3) (emphasis added). The Permit, however, only assumes that areas with temporary impacts become suitable for ABB use within 5 years of disturbance. Permit, pg. 11 (Assumption No. 3). The Permit language should be aligned with the ICP language.

6. The ICP and EA Should Consistently Describe the Size of the Planning Area

The ICP and EA use slightly different acreage figures to describe the size of the Planning Area. The ICP states that the Planning Area is 22,858,163 acres while the EA states it is 22,858,240 acres. The two documents should use the same figure.

G. The Service Should Identify which Reference Documents are Part of the ICP

The ICP identifies a series of “reference documents” but does not specify the documents with which permittees must comply and the documents that simply inform implementation of the ICP. *See* ICP, pg. iii. For example, the ICP states that No Surprises assurances only apply to permittees who are “in full compliance with the ICP, Permit, and other supporting documents.” ICP, pg. 52 (emphasis added). If the Service intends to bind permittees to the terms of supporting documents, the ICP and Permit must clearly identify these documents. Moreover, these documents may not be revised without consent of permittees. Given the numerous inconsistencies among the documents, however, OIPA does not support being bound to the terms of documents outside of the ICP as a condition of the ICP and Permit.

Notably, certain documents appear to generally inform implementation of the ICP, such as the Migratory Bird and Eagle Avoidance Measures, Species Take Avoidance Measures, Presence/Absence Live-trapping Survey Guidance, and Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands. In OIPA’s view, it would not be appropriate to require compliance with the terms of these documents as a condition of the ICP and Permit. The Service should clearly identify those documents with which permittees must comply as a condition of the ICP and Permit and those documents that simply inform implementation of the ICP.

H. The ICP Requires Unnecessary and Duplicative Funding Assurances from Permittees

OIPA questions the need for the onerous financial assurances outlined in the ICP. Most permittees will commit funds for the principal cost of the ICP—mitigation—by purchasing

conservation credits before conducting any activities that result in take of the ABB. *See* ICP, pg. 60. Because permittees will have secured mitigation prior to conducting activities that result in impacts to ABB habitat, only a few requirements of the ICP remain to be implemented, such as monitoring. These requirements are relatively inexpensive and do not necessitate the onerous funding assurances described in the ICP. Furthermore, the Service ignores that it possesses the authority to enforce the terms of the Permits and require completion of the remaining elements of the ICP. The permittee's failure to adhere to the terms of the ICP and Permits can result in revocation of the Permits and, possibly civil and criminal penalties. *See Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp.2d 920, 926-27 (E.D. Cal. 2004). The onerous funding assurances to ensure that the ICP is implemented after mitigation has been secured are unnecessary and should be revised.

Not only are the funding assurances unnecessary, the Service is requiring permittees to demonstrate financial assurances for significantly higher costs than the actual costs of fully implementing the ICP. The Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs ("Estimate of Implementation Costs") suggests that permittees must demonstrate funding assurances to cover the following costs: 1) post-construction restoration; 2) mitigation for project impacts; 3) changed circumstances; and 4) other implementation costs.¹ Many of these costs are unnecessary and duplicative.

First, the requirement that permittees demonstrate financial assurances for mitigation for project impacts is unnecessary when the permittee utilizes mitigation credits to offset impacts. Because permittees must purchase mitigation credits prior to the Service's approval of IPPs, *see* ICP, pg. 60, a permittee will have fulfilled its mitigation obligation with no need to demonstrate any additional funding assurances. Therefore, the Service should revise the funding assurances required for the mitigation of project impacts (Item 2) to clarify that permittees who purchase mitigation credits prior to IPP approval need not demonstrate financial assurances for this element.

Second, the requirements that the permittees demonstrate funding assurances for post-construction restoration and changed circumstances are duplicative. To demonstrate funding assurances for changed circumstances, the Estimate of Implementation Costs requires permittees to demonstrate funding assurances to increase mitigation ratios for all impacts that would have been considered "temporary" or "permanent cover change" to permanent impacts; thus, permittees must demonstrate funding assurances for the difference between the cost of a temporary or permanent cover change impact and the cost of a permanent impact. *See* Estimate of Implementation Costs, pg. 2 (Item 3, subsections A and B). To demonstrate funding

¹ Notably, the Estimate of Implementation Costs does not explicitly state that the permittee must demonstrate funding for the sum of all of these costs. Conceivably, some of these funding assurances only apply if, for example, a permittee is responsible for its own mitigation lands and not if the permittee is acquiring mitigation credits from a conservation bank. The Service should revise the Estimate of Implementation Costs to more clearly identify the costs for which a permittee holder must demonstrate financial assurances.

assurances for post-construction restoration, the Estimate of Implementation Costs requires permittees to calculate the cost of restoring temporary or permanent cover change impacts. *Id.* at pg. 1 (Item 1). The latter requirement ignores that if the permittee fails to restore temporary or permanent cover change impacts in accordance with the ICP, the impact is considered permanent and the permittee must provide additional mitigation. *See* ICP, pg. 48. This cost, however, is captured in the funding assurances for changed circumstances. There is no need for permittees to demonstrate financial assurance for providing permanent mitigation twice. Accordingly, the Service should revise post-construction restoration (Item 1) and changed circumstances (Item 3, subsections A and B) so that a permittee need only demonstrate once that it can provide funding assurances of the cost to increase mitigation from a temporary or permanent cover change impact to a permanent impact.

Finally, the Service must provide additional detail regarding how costs should be calculated for emergency repairs requiring habitat clearing (Item 3, subsection C) and other implementation costs (Item 4). With respect to the cost of emergency repairs, the Service requires permittees to estimate the “total acres of mitigation from new impact.” Permittees, however, have no way of knowing the extent of habitat impact resulting from emergency repairs because this amount will vary depending on the nature of the specific emergency repair. Similarly, permittees may have difficulty determining the “average annual cost of biological/effectiveness monitoring,” the “average cost of compiling the annual report,” and “other minimization measures”; moreover, these estimates may vary widely among permittees. OIPA suggests that the Service work with permittees to identify default values to streamline and standardize the required financial assurances.

III. Detailed Comments on the ICP

The Service should revise the ICP so that it correctly recites the No Surprises Assurances provided by regulation. Additionally, the Service should identify a timeline for its approval of IPPs. Finally, OIPA requests that the Service consider its comments on discrete provisions of the ICP.

A. The ICP Should Correctly Recite No Surprises Assurances

The ICP should correctly recite regulatory language related to the No Surprises assurances rather than paraphrasing the rule. As drafted, the ICP misstates the assurances provided with an incidental take permit, changed circumstances procedures, and procedures for unforeseen circumstances. The Service should review and ensure that the ICP correctly reflects the regulatory language at 50 C.F.R. § 17.22(b)(5).

First, the ICP states: “[N]o Surprises assurances do not apply when a continuing activity is likely to jeopardize the continued existing and recovery of an endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.” ICP, pg. 52.

This statement imprecisely characterizes 50 C.F.R. § 17.22(b)(8). This rule states that the Service cannot revoke a permit (not that “No Surprises assurances do not apply”) unless continuation of the permitted activity (not “a continuing activity”) will appreciably reduce the likelihood of the survival and recovery of the species in the wild. *See id.* (citing 16 U.S.C. § 1539(a)(2)(B)(iv)). Although the differences are slight, Devon requests that the Service adhere to the regulatory language.

Second, the description of changed circumstances erroneously characterizes the Service’s obligations under the No Surprises rule. The ICP states:

If the Service determines that additional conservation measures not provided for in the agreement are necessary to respond to changed circumstances, the Service will not require any conservation measures in addition to those provided for in the agreement without the consent of the Permittee, provided the agreement is being properly implemented.

ICP, pg. 58 (emphasis added). This discussion should also note that the Service will not require any “mitigation” measures not provided for in the agreement. *See* 50 C.F.R. § 17.22(b)(5)(ii).

Finally, the ICP misstates requirements in the event of unforeseen circumstances. The ICP states that the Service has the “responsibility” of demonstrating unforeseen circumstances exist. In fact, the regulation states that the Service has the “burden” of demonstrating unforeseen circumstances exist. *See* 50 C.F.R. § 17.22(b)(5)(iii)(C). The Service should revise the ICP to use the correct regulatory language. Additionally, although the ICP states that in the event of unforeseen circumstances, the Service will work with permittees to develop an appropriate response to new conditions, *see* ICP, pg. 59, the ICP entirely omits the constraints on the measures that the Service may require of permittees. The ICP must include the regulatory language addressing unforeseen circumstances in 50 C.F.R. § 17.22(b)(5)(iii)(B):

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the [Service] may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

The No Surprises assurances and the Service’s limits to react to changed and unforeseen circumstances are material to the ICP and the Permit. The ICP must be revised to incorporate the correct regulatory language.

A. The Service Should Revise the ICP Permit Document to Reflect the Nature of the “Programmatic” Agreement and Facilitate the Appropriate Sequential Order of Project Permitting

Currently, the document entitled, “Permit Application Example for ICP” posted on the USFWS’ ABB website supporting the ICP does not adequately consider the programmatic nature of this document or the sequential manner for which an applicant would go about obtaining an Incidental Take Permit (ITP) under the ICP, which would thereafter be followed with a submittal for IPP’s. This document, also identified as Form 3-200-56, requests certain activities, agency approvals, project descriptions, etc. that will not necessarily be attainable by an operator upon initial submittal of an application seeking the ITP. However, if an operator is to follow the general sequential nature of the document suggested by the USFWS, this document does not facilitate the appropriate timing for project approval.

B. The Service Should Identify a Timeline for Its Evaluation of IPPs

The ICP should include a timetable by which the Service commits to process IPPs. As drafted, the ICP provides permittees with no guidance about the length of time necessary for the Service to approve IPPs. This information would be useful so that permittees can plan accordingly and avoid unexpected delays to their operations.

C. Duplication of Federal Regulations Requested Within the ICP and Their Relationship to SPCC and Spill

In the “USFWS Take Avoidance Measures for Non-Covered Species Related to Selected Oil and Gas Projects within the American Burying Beetle Range in Oklahoma”, for the gray bat, mitigation measure 9 states “Develop and implement a spill prevention and response plan to contain fuel and other chemicals on-site.” This duplicates existing requirements for Spill Prevention Control and Countermeasures plans that are required when fuel and other chemicals are stored on-site. Please revise this requirement to “Develop and implement the required Spill Prevention Control and Countermeasures plan as required for on-site storage of fuel and other chemicals.”

This comment applies where a spill prevention and response plan requirement to contain fuels and chemicals onsite is identified for the Arkansas River shiner and the Ozark cavefish. It is also applies to the same requirement for harparella for the construction/commissioning.

1. For the operation and/or operation/maintenance of the Arkansas darter, leopard darter, harparella, Neosho madtom, Neosho mucket, Ouachita rock pocketbook, rabbitsfoot, scaleshell mussel, Sprague’s pipit, and winged

mapleleaf, the spill prevention and response plan requirements do not reference on-site storage of fuels and chemicals, and the intent appears to be a broader protection against operational spills. Therefore it does not duplicate the SPCC requirements.

The exclusion of spills and releases from ICP coverage is based on the false assumption that spills are inherently unlawful. While spills and releases are undesirable both from a business and an environmental standpoint, only a small minority of spills and releases result in water or air quality violations. The irony of the USFWS stance on this issue is that inadequate response to a spill or release is what is most likely to be the only unlawful activity associated with a spill or release, and the failure of the USFWS to cover responses to spills and releases create a regulatory impediment to a lawful response. Since very few spills or releases trigger EPA involvement, the assumption that responses to spills or releases can generally be performed under Section 7 consultation is also false.

D. Concern Regarding Additional Mitigation Measures

The mitigation measures impose restrictions on flares without any scientific evidence that flares increase ABB mortality. Flares cannot be equated with “artificial lighting.”

Additionally, the issue of grass length is used for 2 different purposes: 1) for determining unfavorable habitat if the vegetation is less than 8”, and 2) as a mitigation to minimize take of the ABB by leaving vegetation at least 8” tall when mowing even during dormant season. The historic explanation for the first use has been that vegetation shorter than 8” allows other prey to remove the carrion before the ABB can get to it. The explanation for the second use is that it prevents desiccation of the ABB that are below grade. It seems unlikely that two different issues of concern would result in identical criteria. The choice of 8” for preventing desiccation is based on a study that did not even address vegetation height and therefore the choice of 8” seems to have been arbitrarily chosen.

IV. Conclusion

Thank you for the opportunity to provide these comments regarding the ICP/EA for the ABB in Oklahoma. OIPA and its members appreciate FWS’s careful consideration of these views and support this important effort. OIPA believes a properly developed and completed EA and ICP will simultaneously enable critical energy projects to move forward while achieving the Service’s obligation to protect the ABB.

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If you have any questions or require further information, please feel free to contact me directly at (405) 601-2332, or at bwoodard@oipa.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Woodard", written over a horizontal line.

Brian Woodard

Vice President - Regulatory Affairs

Oklahoma Independent Petroleum Association